

Approved:


BENJAMIN A. GIANFORTI/DANIEL LOSS
Assistant United States Attorneys

Before:

HONORABLE ANDREW E. KRAUSE
United States Magistrate Judge
Southern District of New York

- - - - -	x
	: 21 Mag. 1699
	:
UNITED STATES OF AMERICA	: SEALED
	: <u>COMPLAINT</u>
	:
- v. -	: Violations of
	: 15 U.S.C. §§ 78j(b) &
	: 78ff; 17 C.F.R. § 240.10b-5;
	: and 18 U.S.C. § 1343
JOSEPH CIMINO,	:
	: COUNTY OF OFFENSE:
Defendant.	: Orange
	:
- - - - -	x

SOUTHERN DISTRICT OF NEW YORK, ss.:

MARISSA TUOHY, being duly sworn, deposes and says that she is a Special Agent with the Federal Bureau of Investigation ("FBI"), and charges as follows:

COUNT ONE
(Securities Fraud)

1. From at least in or about 2014 through at least in or about 2018, in the Southern District of New York and elsewhere, JOSEPH CIMINO, the defendant, knowingly and willfully, directly and indirectly, by use of the means and instrumentalities of interstate commerce, and of the mails and of facilities of national securities exchanges, in connection with the purchase and sale of securities, would and did use and employ, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, contrary to Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing devices, schemes, and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made,

not misleading; and (c) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon persons, to wit, CIMINO made false and misleading representations by interstate wire communication to solicit and maintain investments in a tequila company.

(Title 15, United States Code, Sections 78j(b) & 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5)

COUNT TWO
(Wire Fraud)

2. From at least in or about 2014 through at least in or about 2018, in the Southern District of New York and elsewhere, JOSEPH CIMINO, the defendant, knowingly and willfully, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations and promises, for the purpose of executing such scheme and artifice, transmitted and caused to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds, to wit, CIMINO made false and misleading representations by interstate wire communication to solicit and maintain investments in a tequila company.

(Title 18, United States Code, Section 1343)

The basis for my knowledge and the foregoing charges are, in part, as follows:

3. I am a Special Agent with the FBI and I have been personally involved in the investigation of this matter. I have been a Special Agent with the FBI for approximately three years. I am currently assigned to a white-collar crime squad in the FBI's New York Field Office. Before that, I was employed as a criminal defense lawyer for approximately eight years. I have received training regarding securities and wire fraud and have been involved in investigations relating to violations of the federal securities laws and related offenses.

4. This affidavit is based upon my review of documents and my interviews of witnesses. Because this Complaint is being submitted for the limited purpose of establishing probable cause, it does not include all the facts that I have learned

during the course of my investigation. Where the contents of documents and statements of others are reported herein, they are reported in substance and in part. Where figures, calculations, and dates are set forth herein, they are approximate, unless stated otherwise.

The Scheme to Defraud Victim-1

5. Based upon my interviews of witnesses and my review of documents, including documents provided by witnesses, documents received from the Securities & Exchange Commission, open source records, bank account statements, and electronic communications between JOSEPH CIMINO, the defendant, and investors in a tequila company (the "Tequila Company"), I have learned that:

a. CIMINO's professional background is in the food and beverage and hospitality industries. At some point prior to in or about December 2014, CIMINO conceived of starting the Tequila Company, established an LLC for the company based in Warwick, New York, in Orange County, and set about finding investors. Until in or about August 2017, CIMINO owned approximately 51% of the membership interests in the Tequila Company and, until in or about January 2018, served as its Managing Member under the terms of the Tequila Company's operating agreement (the "Operating Agreement"), which was amended at least once during the relevant period. The versions of the Operating Agreement that I have reviewed have all included the following provision, in substance and in part: that the Tequila Company "shall pay directly or reimburse the Managing Member for certain expenses of the Company incurred by the Managing Member in the management of the Company's business." The operating agreement that appears to have come into effect in or around April 2016 provided further, in substance and in part, that the "payment of compensation to the Managing Member" requires "the consent of the Members holding at least sixty-six (66%) percent of the total Membership Interests" (the "Amended Operating Agreement").

b. CIMINO ran the Tequila Company day-to-day and was the face of the company. The Tequila Company launched its initial line of tequilas, which were made in Mexico, in Las Vegas, Nevada in or around 2016. Based on my review of internal documents from the Tequila Company, and communications with a former Tequila Company executive ("Employee-1"), I have learned

that, during the relevant period, all of the Tequila Company's sales were through a U.S. importer that handled both importing the tequila from Mexico into the United States and selling the tequila on to U.S. distributors (the "Importer"). In other words, during the relevant period, in order to make sales and distribute product in the United States, the Tequila Company first had to import tequila through the Importer.

c. CIMINO was introduced to a number of investors in the Tequila Company by a financial advisor (the "Financial Advisor"). As discussed in more detail below, beginning at least in or about December 2014, CIMINO made numerous false and misleading representations to investors and prospective investors including, among other things, fabricating the existence of some current investors in the Tequila Company, overstating the amount of funds previously invested by others, falsifying the Tequila Company's financial performance and progress in penetrating new markets, and falsely claiming that inventory had been destroyed in a hurricane.

d. Based in part on these false and misleading representations, CIMINO solicited and received at least approximately \$935,000 in equity investments in the Tequila Company from a total of at least approximately 25 investors.

e. CIMINO used interstate wires to execute his scheme. For example, he frequently communicated with investors by email which travelled interstate and caused the Tequila Company's counsel (the "Tequila Company's Counsel") to do the same. In addition, in accordance with CIMINO's instructions, several investors transmitted their investments to the Tequila Company's bank account in New York (the "Tequila Company Account") by wire transfer, in some cases from bank accounts located outside New York.

f. During the relevant period, CIMINO had sole signatory authority over the Tequila Company Account, and he wired approximately \$472,000 from the Tequila Company Account to a personal bank account, over which he also had sole signatory authority (the "Cimino Account"). As discussed in more detail below, CIMINO used investor money to pay for personal expenses contrary to the representations contained in, among other things, the Operating Agreement and the Amended Operating Agreement.

g. At some point prior to in or about October 2015, the Financial Advisor introduced CIMINO to a potential investor ("Victim-1"), who was interested in investing in the Tequila Company through an investment vehicle Victim-1 had established with other investors (the "Investment Vehicle"). In or about October 2015, Victim-1 and his counsel ("Victim-1's Counsel") began negotiating the terms of the Investment Vehicle's investment in the Tequila Company with CIMINO.

h. On or about December 2, 2015, the Tequila Company's Counsel sent Victim-1's Counsel a list of the Tequila Company's "current . . . investors/members" (the "Investor List") via email, copying CIMINO, Victim-1, and another individual. It is clear from the email thread that the Tequila Company's Counsel is acting at CIMINO's direction. The document listed approximately ten purported investors, not including CIMINO, who was listed as the 51% owner of the Tequila Company with a capital contribution of "Cash and Services in Kind." These ten purported investors had supposedly invested approximately \$390,000 in the Tequila Company. Among the purported investors were three who, as described below, were fake ("Fake Investor-1," "Fake-Investor-2," and "Fake Investor-3"). According to the Investor List, Fake Investor-1 had purportedly invested approximately \$100,000; Fake Investor-2 had purportedly invested approximately \$50,000; and Fake Investor-3 had purportedly invested approximately \$10,000.

i. On or about December 28, 2015, CIMINO sent Victim-1 an executive summary (the "2016 Executive Summary") and projected profit and loss ("P&L") statement for 2016 (the "2016 P&L Statement") via email. CIMINO's email stated, in substance and in part, that the Tequila Company had "a total of 1950 cases committed to different Distributors" and that the Importer had "advanc[ed] an order of a full container [of tequila] to be delivered in April/May [2016]." The 2016 Executive Summary stated, in substance and in part, that the Tequila Company's capital goal was \$1,000,000 in investments, and that approximately half of that total had already been raised. The 2016 Executive Summary also stated, in substance and in part, that "[t]he first container of more than 20,000 bottles ha[d] arrived at the Distillery in Mexico [the ("Distillery")] and [was] waiting to be filled." The 2016 P&L Statement projected profitability in 2016 of nearly \$150,000 based on projected

sales of approximately \$1,233,000. As set forth below, all of these statements were false or misleading:

i. Based on my review of records from the Distillery, I know that the Tequila Company did not place any orders for tequila with the Distillery until in or around the first or second quarter of 2017. CIMINO also did not order any bottles for the Distillery's use until in or around the end of 2016 or the beginning of 2017, approximately one year after CIMINO's email to Victim-1 discussed above.

ii. Based on my review of records from the Importer, I know that the Tequila Company made no sales to the Importer in 2015 or 2016, contrary to CIMINO's statement that, as of his December 28, 2015 email to Victim-1, the Importer had already "advanc[ed] an order of a full container [of tequila] to be delivered in April/May [2016]." Based on communications between Victim-1 and Employee-1, as well as my interview of Employee-1, I understand that Employee-1 reviewed the Tequila Company's records and confirmed that the Tequila Company made no sales of tequila until some point in or around the first half of 2017.

iii. Based on my review of bank records for the Tequila Company Account, I know that, as of on or about December 28, 2015, the Tequila Company had raised only approximately \$222,941.91 in capital, substantially less than the approximately \$500,000 that CIMINO indicated had already been raised.

iv. Based on the foregoing, the projection of profitability in the 2016 P&L Statement was false, as it was based on non-existent sales.

j. On or about April 20, 2016, the Investment Vehicle wired approximately \$150,000 to the Tequila Company Account from a bank account in Pennsylvania (the "Investment Vehicle Account").

k. On or about July 18, 2017, CIMINO sent Victim-1 and the other investors in the Tequila Company an investor report and P&L statement for the second quarter of 2017 (the "Q2 2017 P&L Statement") via email. CIMINO's email stated, in substance and in part, that the Tequila Company had sold approximately 891 cases in Puerto Rico year-to-date and that,

overall year-to-date, the Tequila Company had "delivered" approximately 3,410 cases, with orders for approximately 2,050 cases to be filled and approximately 650 cases ordered for "Fall Delivery." The Q2 2017 P&L Statement reported, in substance and in part, sales of approximately 115 cases of tequila in January 2017, 125 cases in February 2017, 220 cases in March 2017, 775 cases in April 2017, 750 cases in May 2017, and 1,425 cases in June 2017. The Q2 2017 P&L Statement also contained a line item expense for insurance. As set forth below, all of these statements were false:

i. Based on records from the Importer that I have reviewed, I know that the Tequila Company made no sales to the Importer in January 2017, February 2017, March 2017, April 2017, and May 2017 and sold approximately 350 cases to the Importer in June 2017. It was thus false that the Tequila Company had delivered thousands of cases of tequila in 2017, since only approximately 350 cases had been ordered from the Importer for import into the United States as of July 2017.

ii. Based on communications between Victim-1 and Employee-1 that I have reviewed, I understand that the Tequila Company's total sales in Puerto Rico during the relevant period were no more than approximately 160 cases of tequila on a single occasion (substantially less than the 891 cases falsely represented in the 2017 P&L Statement).

1. Later on or about July 18, 2017, CIMINO sent Victim-1 a projected cash flow statement for the Tequila Company through May 1, 2018 via email. From on or about July 18, 2017 through on or about July 20, 2017, CIMINO and Victim-1 exchanged emails in which they discussed, in substance and in part, that CIMINO needed approximately \$50,000 to \$150,000 in additional funding to keep the Tequila Company going. On or about July 31, 2017, CIMINO sent the following email to Victim-1, in substance and in part:

After carefully looking at the Cash Flow analysis done i can say with all security that these numbers are correct.

The question posed was how many cases can you sell?
My immediate reaction was 10K cases, however i always think "from now on" and not counting what we have done, thus came the confusion of total sales.

It is my hope that with what we have achieved so far (about 3500 cases) that will be adding another 10K cases by the end of the year totaling 13K cases more or less

When we looked at the total sales on the cash flow analysis the revenue from June 2017 to May 2018 are correct at \$ 3,531,512.00 . . .

These Numbers are taken from Projected Sales Budget of 2017 (July-December) and of 2018 (January-May).

July has not closed yet but it looks on target.

At this point have sweated it out and have managed to stay afloat and keep going with day to day business. The questions remains as to how much do i need to get us through the next few months till the AR start to arrive on a monthly basis.

\$100,000 additional capital is needed

. . . .

\$50,000 would be a great cushion to have available if needed.

m. As set forth above, CIMINO's representation about the Tequila Company having sold 3,500 cases of tequila year-to-date was false. Thus, contrary to CIMINO's statements to Victim-1 on or about July 31, 2017, the "numbers" were not "correct."

n. On or about August 3, 2017, Victim-1, on behalf of the Investment Vehicle, offered to invest an additional \$75,000 in exchange for an additional 7.5% ownership interest in the Tequila Company, which would come out of CIMINO's 51% stake. CIMINO accepted the offer the same day. Thereafter, Victim-1's Counsel and the Tequila Company's Counsel began negotiating the terms of the Investment Vehicle's additional investment.

o. On or about August 9, 2017, in response to requests from Victim-1's Counsel, the Tequila Company's Counsel sent Victim-1's counsel an updated investor list for the Tequila Company (the "Updated Investor List") via email, copying CIMINO,

Victim-1, and others. The Updated Investor List again listed Fake Investor-1, Fake Investor-2, and Fake Investor-3 among the Tequila Company's investors. Later the same day, the Investment Vehicle wired approximately \$75,000 to the Tequila Company Account from the Investment Vehicle Account.

p. On or about October 25, 2017, CIMINO sent Victim-1 and the other investors in the Tequila Company an investor report and P&L statement for the third quarter of 2017 (the "Q3 2017 Report") via email. The Q3 2017 Report stated, in substance and in part, the following:

SALES (Year-to-Date)

PA	1,115 cases
MD, DC, DE	632 cases
SC	898 cases
GA	634 cases
PR	2,756 cases
<u>TOTAL</u>	<u>6,035 cases</u>

. . . .

As you all know, Puerto Rico was damaged badly during Hurricane Maria and as a result, our distributor . . . lost 800 cases of [tequila] that were on hand at its warehouse. The distributor's Insurance will reimburse him for lost inventory but it may take a long time. In the interim, this will put pressure on our receivables cash flow. . . .

As of this week, we have secured Distribution in . . . Texas.

q. I have reviewed an annotated version of the Q3 2017 Report prepared by Employee-1 based on Employee-1's review of the Tequila Company's records and knowledge of the Tequila Company's sales. Based on that annotation, and my discussions with Employee-1, I understand that all of the foregoing statements were false. The Tequila Company's actual year-to-date sales in Pennsylvania were approximately 638 cases; in Maryland, the District of Columbia, and Delaware, approximately 95 cases; in South Carolina, approximately 183 cases; in Georgia, approximately 220 cases; and, in Puerto Rico, approximately 120

cases. Employee-1 also confirmed, after speaking with the Tequila Company's distributor in Puerto Rico, that no tequila was lost during Hurricane Maria. In addition, Employee-1 confirmed that, at the time when CIMINO emailed the Q3 2017 Report, the Tequila Company had not secured distribution in Texas.

r. At some point between on or about October 25, 2017 and on or about November 21, 2017, CIMINO became unavailable for a period of time. Prior to this period, CIMINO instructed an individual close to him ("Individual-1") and Employee-1 to run the Tequila Company on CIMINO's behalf. In transferring control of the Tequila Company in part to Employee-1, CIMINO caused the Tequila Company's Counsel to grant Employee-1 access to the Tequila's Company's records, including CIMINO's email. On or about November 21, 2017, Employee-1 and Individual-1 met with Victim-1 and told Victim-1, in sum and substance, that they believed that both the Q3 2017 Report and the Updated Investor List were fraudulent.

s. On or about December 26, 2017, Victim-1 sent an email to the Tequila Company's investors, copying CIMINO, that stated, in substance and in part, the following:

2. The list of members attached to the Operating Agreement . . . , which is the governing document of the members, is false. [Individual-1] informed me that various members listed are "phantom" members; that they did not invest and that [CIMINO] forged their signatures on the Operating Agreement. We have further confirmed these false representations as several of the individuals copied on this email are not named as members on either the list that was provided to us (attached to the Operating Agreement) when we first invested in April 2016 or when we invested additional capital in August 2017. In fact, at no time during our involvement with [the Tequila Company] have we ever received an accurate investor listing, which is required by the Operating Agreement.

3. [Individual-1] informed me that the financial statements provided to the members by [CIMINO] were falsified. We were able to confirm that the quarterly investor updates provided by [CIMINO] contained gross

misinformation on sales and the financial condition of [the Tequila Company]. The Company is not doing well, as claimed by [CIMINO] and outlined in the false financial statements and quarterly reports. In fact, it appears the Company is insolvent. The Company's accounts payable vastly outweigh its receivables, and moreover, the capital invested by the members appears to be substantially gone.

4. [The Investment Vehicle] invested additional funds into [the Tequila Company] in August 2017 based on fraudulent sales reports and grossly inflated sales projections.

5. [Individual-1] informed me that [the Tequila Company's] funds have been comingled with personal funds
. . . .

t. At the conclusion of the email, Victim-1 called for a meeting of the Tequila Company's investors in January 2018 to discuss the company's future and to potentially remove CIMINO from his managerial role with the company pursuant to the terms of the Amended Operating Agreement.

u. Later that day, CIMINO responded to Victim-1's email, stating, in substance and in part, the following:

Here is where i made a mistake nearly 2 years ago. For the sake of [Victim-1's] investment i indeed altered the Members list . . . to satisfy [Victim-1's] requirements for an investment. I shouldn't have altered the list, deceive him, and perhaps made another mistake in adding [Victim-1] to our family as a few of you had concerns. To this I sincerely apologize.

v. In response to Victim-1's third allegation regarding the falsification of financial statements, CIMINO stated, in substance and in part, "[Victim-1] is talking about the info I sent him and only him and not to you." In response to Victim-1's fourth allegation regarding Investment Vehicle's being induced to invest further funds based on CIMINO's false representations, CIMINO stated, in substance and in part, "[t]his statement unfortunately is correct. It may be in the best interest of [the Tequila Company] to reimburse [Victim-1]

for all his investments in [the Tequila Company]." In response to Victim-1's fifth allegation about the commingling of company and personal funds, CIMINO stated, in substance and in part, "This is serious allegation on [Victim-1's] part and completely false. I have not used [the Tequila Company's] Funds for personal gain. My expenses accrued on a month basis have been paid through the company and are backed by a [sic] accurate expense report and receipts for each month for the past 3 years."

w. On or about January 11, 2018, the Tequila Company's investors and CIMINO convened at a hotel in New Jersey. During the meeting, the investors voted to remove CIMINO from his managerial position with the Tequila Company. The investors voted to appoint Victim-1 as the acting Managing Member of the company.

x. As noted above, the Tequila Company's Amended Operating Agreement provided, in substance and in part, that the Managing Member - that is, CIMINO - could only draw compensation from the Tequila Company if such compensation was approved by at least 66% of the Tequila Company's Members. The Operating Agreement and Amended Operating Agreement also provided for reimbursement of the Managing Member for "certain expenses of the Company incurred by the Managing Member in the management of the Company's business." As also noted above, during the relevant period, CIMINO wired approximately \$472,000 from the Tequila Company Account to the Cimino Account. Based on my review of an analysis of the funds flowing in and out of the Tequila Company Account and the Cimino Account, I believe that CIMINO used the Tequila Company's assets for personal expenses, contrary to the representations contained in the Operating Agreement, the Amended Operating Agreement, and CIMINO's email to the Tequila Company's investors on or about December 26, 2017 described above. The approximately \$472,000 that CIMINO wired to the Cimino Account from the Tequila Company Account reflects approximately 94% of the funds that flowed into the Cimino Account during the relevant period. The Cimino Account then reflects substantial sums being used on apparently personal expenses. For example, I believe that CIMINO spent a substantial portion of company funds provided by investors on groceries, pet supplies, and personal entertainment, among other personal expenditures.

6. On or about February 24, 2020, I and another Special Agent with the FBI stopped JOSEPH CIMINO, the defendant, as he was coming through customs at Newark Liberty Airport. After being *Mirandized*, CIMINO executed a written waiver of his rights and agreed to speak with us.

a. During the interview, CIMINO admitted that he fabricated investors on the investor lists circulated to Victim-1 and other investors in the Tequila Company. We provided CIMINO with the Updated Investor List and he circled the investors that he had fabricated. Those investors were: Fake Investor-1, Fake Investor-2, and Fake Investor-3. As set forth above, these purported investors appeared on the Investor List sent to Victim-1 on or about December 2, 2015 and on the Updated Investor List sent to Victim-1's Counsel on or about August 9, 2017.

b. During the interview, we showed CIMINO a copy of his December 26, 2017 response to Victim-1's email to the Tequila Company's investors of the same date. CIMINO confirmed that he had written the response and stated that what he had written was true. CIMINO also admitted that his assertions in the Q3 2017 Report about tequila being destroyed in Puerto Rico during Hurricane Maria were false and that the Tequila Company had never had insurance. CIMINO again denied having used company money for personal expenses.

WHEREFORE, deponent prays that JOSEPH CIMINO, the defendant, be arrested, and imprisoned or bailed as the case may be.

/s/ Marissa Tuohy (by AEK, with permission)
(credentials inspected: FBI # 27496)

MARISSA TUOHY
Special Agent
Federal Bureau of Investigation

Sworn to me through the transmission of this
Affidavit by reliable electronic means, pursuant to
Federal Rules of Criminal Procedure 41(d)(3) and 4.1
On: February 12, 2021

By FaceTime



HONORABLE ANDREW E. KRAUSE
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK